

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CAROL LUCARELLI, special administratrix of
the estate of TSOSIE JUNE SR., deceased;
TINA JUNE; SARAH JUNE; TSOSIE JUNE,
JR.; RONALD JUNE; ROBERT JUNE;
JASON JUNE; NATHAN JUNE; and GINA
JUNE, surviving heirs of TSOSIE JUNE, SR.,
deceased,

Plaintiffs,

vs.

TRC FOUR CORNERS DIALYSIS CLINICS,
LLC; DOES 1 through 50, inclusive; ROE
CORPORATIONS 1 through 50, inclusive,

Defendants.

Case No.: 2:07-cv-1010-RLH-PAL

O R D E R

(Motion to Dismiss—#4; Motion to
Remand—#6; Motion to Stay—#8; Motion to
Transfer—#16; Motion to Strike—#23)

Before the Court is Defendant TRC Four Corners Dialysis Clinics, LLC's **Motion to Dismiss** (#4), filed August 7, 2007. The Court has also considered Plaintiffs Carol Lucarelli, special administratrix of the estate of Tsosie June, Sr., deceased, and the above-named surviving heirs' Opposition (#8), filed August 27, 2007, and Defendant's Reply (#12), filed September 7, 2007.

Also before the Court is Plaintiffs' **Motion to Remand** (#6), filed August 27, 2007. The Court has also considered Defendant's Opposition (#14), filed September 11, 2007; Plaintiffs' Reply (#15), filed September 25, 2007; and Plaintiffs' Errata (#18), filed October 15, 2007.

Also before the Court is Plaintiffs' **Motion to Stay** (#8), filed August 27, 2007. The Court has also considered Defendant's Response (#13), filed September 11, 2007.

Also before the Court is Defendant's **Motion to Transfer** (#16), filed September 26, 2007. The Court has also considered Plaintiffs' Opposition (#17), filed October 8, 2007, and Defendant's Reply (#19), filed October 19, 2007.

Also before the Court is Defendant's **Motion to Strike** (#23), filed November 7, 2007. The Court has also considered Plaintiffs' Opposition (#27), filed November 19, 2007, and Defendant's Reply (#28), filed November 30, 2007.

BACKGROUND

This case is one of at least thirty-two lawsuits filed by separate plaintiffs in Nevada state court based on allegations of Defendant's negligent operation of hemodialysis treatment facilities. Defendant removed at least fifteen of these lawsuits to the United States District Court for the District of Nevada on the basis of diversity of citizenship. Of the thirty-two lawsuits, only two plaintiffs actually received treatment in Nevada. In the instant case, Plaintiffs are Arizona citizens and the decedent, Tsosie June, Sr., received his dialysis treatments in Arizona. Defendant is a New Mexico corporation with its principal place of business in California. For the reasons set forth below, the Court denies Plaintiffs' Motion to Remand and grants Defendant's Motion to Transfer. As such, Plaintiffs' Motion to Stay and Defendant's Motion to Dismiss and Motion to Strike are denied as moot.

DISCUSSION

I. Motion to Remand

Plaintiffs move the Court for an order remanding this case to the Eighth Judicial District Court for the State of Nevada. 28 U.S.C. § 1441 permits a defendant to remove a state court action if the federal district court has original jurisdiction. A defendant invoking the removal statute bears the burden of establishing jurisdiction, and the statute is strictly construed against removal. *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004).

1 Consequently, “[f]ederal jurisdiction must be rejected if there is any doubt as to the right of
2 removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). But while a
3 federal court “will not take jurisdiction if it should not . . . it is equally true, that it must take
4 jurisdiction if it should.” *Cohens v. Virginia*, 19 U.S. (1 Wheat) 264, 404 (1821). Thus, a district
5 court with proper jurisdiction lacks discretion to remand. *See Carnegie-Mellon Univ. v. Cohill*,
6 484 U.S. 343, 356 (1988).

7 Defendant removed this case from Nevada state court based on diversity of
8 citizenship. *See* 28 U.S.C. § 1332(a). Plaintiffs do not dispute this Court’s jurisdiction or the
9 procedural validity of removal; rather, they argue that Defendant waived the right to remove this
10 case because of its state-court actions in other lawsuits.

11 “A party, generally the defendant, may waive the right to remove to federal court
12 where, after it is apparent that the case is removable, the defendant takes actions in state court that
13 manifest his or her intent to have the matter adjudicated there, and to abandon his or her right to a
14 federal forum.” *Resolution Trust Co. v. Bayside Developers*, 43 F.3d 1230, 1240 (9th Cir. 1994).
15 “A waiver of the right to removal must be clear and unequivocal.” *Id.* (citations and internal
16 quotations omitted). “In general, the right of removal is not lost by action in the state court short
17 of proceeding to an adjudication on the merits.” *Id.* (citations and internal quotations omitted).

18 The Court begins by noting that waiver is an exception to its duty “to adjudicate a
19 controversy properly before it.” *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188
20 (1959). Waiver in this case must be based on Defendant’s affirmative conduct in the state court in
21 this case. The record establishes that Plaintiffs filed this case in state court on June 14, 2007, and
22 served Defendant with the Complaint on July 3, 2007. Defendant timely removed this case on
23 July 31, 2007. Plaintiffs submit no evidence that Defendant took any action other than to file
24 notice of removal. Instead, Plaintiffs contend that the conduct of Defendant’s parent corporation
25 in other, similar cases in state court constitutes waiver. They argue that the other, similar cases
26 were consolidated in state court and that if this case were remanded, it would also be subject to the

1 consolidation. Consequently, because the cases would presumably be consolidated, Plaintiffs
2 claim that the actions in the other cases should be imputed to this one. Plaintiffs' argument,
3 however, ignores the reality that this is a separate case involving a distinct plaintiff and facts.

4 The Court finds the would-be state court consolidation irrelevant to its
5 determination of whether Defendant properly removed this case to federal court, and Defendant's
6 conduct in the other cases cannot waive its right to remove in this case. The Court recognizes that
7 consolidating this case in the state court might promote efficiency and a conservation of judicial
8 resources,¹ but those considerations are secondary to the Court's duty to exercise its jurisdiction
9 and Defendant's right to proceed in a federal forum. Moreover, efficiency considerations alone
10 cannot justify remand. *See Thermatron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976)
11 ("That justice may move more slowly in some federal courts than in their state counterparts is not
12 one of the considerations that Congress has permitted the district courts to recognize in passing on
13 remand issues."), *abrogated on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706,
14 714–15 (1996).

15 Further, the Court notes that if it were to follow Plaintiffs' reasoning and remand
16 this case, the Court would essentially eviscerate Defendant's right to remove to federal court in all
17 future hemodialysis-related cases filed against it—regardless of the plaintiff. None of the cases
18 cited by Plaintiffs contemplates such an expansive and far-reaching result. The Court is also
19 aware that such a result would most substantially benefit Plaintiffs' *counsel*. Of the thirty plus
20 cases filed thus far—and more are purportedly on the way—only two involve plaintiffs from
21 Nevada. The Court views this Motion as an improper attempt by Plaintiffs' counsel to retain
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23
24 ¹ The Court notes, however, that while the consolidated cases involve similar tort
25 claims against related defendants, proceeding in a common forum would not necessarily be
26 more efficient. The evidence and witnesses are located in several different states, and at
minimum, each plaintiff will need to uniquely prove causation and his or her damages.
Causation and damages are significant issues given that each plaintiff was already seriously
ill before receiving dialysis treatments in Defendant's clinics.

1 control over a plethora of cases that most appropriately belong in other forums, *see* Part II, and the
 2 Court is not inclined to assist in such an endeavor.

3 Accordingly, Plaintiffs' Motion to Remand is denied.

4 **II. Motion to Strike and Motion to Stay**

5 Because the Court denies the Motion to Remand, Defendant's Motion to Strike
 6 Plaintiffs' Errata to its Motion to Remand and Plaintiffs' Motion to Stay are denied as moot.

7 **III. Motion to Transfer**

8 Defendant moves the Court to transfer this case to the District of Arizona pursuant
 9 to 28 U.S.C. § 1404(a). Section 1404(a) permits a district court to transfer any civil action to any
 10 other district or division where the action might have been brought for the convenience of the
 11 parties and witnesses and in the interests of justice. "To support a motion for transfer, the moving
 12 party must show: (1) that venue is proper in the transferor district; (2) that the transferee district is
 13 one where the action might have been brought; and (3) that the transfer will serve the convenience
 14 of the parties and witnesses and will promote the interest of justice." *Goodyear Tire & Rubber*
 15 *Co. v. McDonnell Douglas Corp.*, 820 F. Supp. 503, 506 (C.D. Cal. 1992).

16 **A. Venue in the District of Nevada**

17 Defendant removed this action to this Court pursuant to 28 U.S.C. § 1441(a), which
 18 provides: "any civil action brought in a State court of which the district courts of the United States
 19 have original jurisdiction, may be removed . . . to the district court of the United States for the
 20 district and division embracing the place where such action is pending." Here, Plaintiffs filed this
 21 case in Clark County; this Court embraces Clark County and is therefore the proper venue for
 22 removal. *See Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665 (1953).

23 **B. Propriety of Action in the District of Arizona**

24 "In determining whether an action might have been brought in a district, the court
 25 looks to whether the action initially could have been commenced in that district." *Hatch v.*
 26 *Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985). Plaintiffs could have commenced this action

1 in the District of Arizona if that court would have had subject matter jurisdiction over the claims
2 and personal jurisdiction over the Parties.

3 Pursuant to 28 U.S.C. § 1332, Plaintiffs could have brought this action in the
4 District of Arizona under diversity jurisdiction because the Parties are diverse and the amount in
5 controversy exceeds \$75,000. Mr. June was an Arizona citizen at the time of his death, and thus
6 Carol Lucarelli, special administratrix of June's estate, is deemed a citizen of Arizona. *See* 28
7 U.S.C. § 1332(c). Moreover, Defendant asserts that the surviving heirs of June's estate are also
8 Arizona citizens, and Plaintiff does not contest that assertion. Defendant is incorporated in New
9 Mexico and maintains its principal place of business in California. Accordingly, the Parties are
10 diverse as required by § 1332. Also, Defendants have shown that Plaintiffs seek damages for loss
11 of support, companionship, society, consortium, and pain and suffering caused by Tsosie June,
12 Sr.'s death, as well as special damages for medical care, treatment, burial and funeral expenses,
13 and punitive damages, which exceed the \$75,000 threshold. Therefore, the District of Arizona
14 would have original jurisdiction over this action.

15 In addition, the District of Arizona would have personal jurisdiction over the
16 Defendant. Arizona's long-arm statute "permits the exercise of personal jurisdiction to the extent
17 allowed by the due process clause of the United States Constitution." *Ochoa v. J.B. Martin &*
18 *Sons Farms, Inc.*, 287 F.3d 1182, 1188 (9th Cir. 2002) (citing Ariz. R. Civ. P. 4(e)(2)). "[D]ue
19 process requires only that in order to subject a defendant to [suit] if he be not present within the
20 territory of the forum, he have certain minimum contacts with it such that the maintenance of the
21 suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v.*
22 *Washington*, 326 U.S. 310, 316 (1945). Defendant's contacts would provide Arizona with general
23 personal jurisdiction. Defendant operates a hemodialysis facility in Tuba City, Arizona, where it
24 employs Arizona citizens and is subject to Arizona taxation. Thus, subjecting Defendant to
25 jurisdiction in the District of Arizona would not violate due process.
26

Consequently, Plaintiff could have brought this action originally in the District of Arizona because the Arizona federal court would have original jurisdiction over the claims and personal jurisdiction over the Parties.

C. Convenience of the Parties and the Interests of Justice

In considering the convenience of the parties and witnesses and the interests of justice, courts evaluate: (1) the location where the alleged harm occurred, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, (8) the ease of access to the evidence, and (9) the relevant public policy of the forum state. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498–99 (9th Cir. 2000).

Here, the convenience of the Parties and witnesses and the interests of justice favor transferring this case to the District of Arizona. Mr. Tsosie June, Sr. received treatments in Tuba City, Arizona at Defendant's hemodialysis facility. The evidence and witnesses of his treatments, including the doctors and nurses who treated him, are all located in Arizona. As such, compulsory process would be unavailable to secure their attendance in Nevada. Moreover, the costs of litigation would be substantially greater because the attorneys and witnesses would be forced to travel for discovery and trial. Arizona also has the most significant relationship to this case, and consequently, Arizona tort law applies. *See Gen. Motors Corp. v. Eighth Judicial Dist. Court*, 134 P.3d 111, 116 (Nev. 2006). Thus, a federal court in Arizona would be more familiar with the law of this case. In addition, while Plaintiffs chose to file this suit in Nevada, the "operative facts" of the case did not occur in Nevada, and so Plaintiffs' preference "is entitled to only minimal consideration." *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987). Finally, the Court is unaware of any Nevada public policy that favors retaining a Nevada venue when the only connection with the state is Plaintiffs' counsel.

1 In sum, the Court finds that venue is proper in the District of Nevada, that this
2 action could have originally been brought in the District of Arizona, and that the convenience of
3 the Parties and witnesses and the interests of justice favor transferring this case. Accordingly, the
4 Court grants Defendant's Motion to Transfer.

5 **IV. Motion to Dismiss**

6 Because the Court grants Defendant's Motion to Transfer, it denies Defendant's
7 Motion to Dismiss as moot.

8 **CONCLUSION**

9 Accordingly, and for good cause appearing,
10 IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#4) is DENIED
11 as moot.

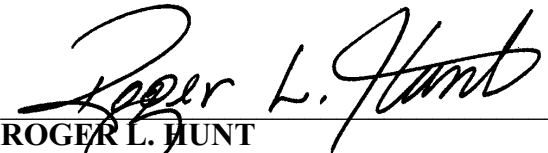
12 IT IS FURTHER ORDERED that Plaintiffs' Motion to Remand (#6) is DENIED.
13 IT IS FURTHER ORDERED that Plaintiffs' Motion to Stay (#8) is DENIED as
14 moot.

15 IT IS FURTHER ORDERED that Defendant's Motion to Transfer (#16) is
16 GRANTED.

17 IT IS FURTHER ORDERED that Defendant's Motion to Strike (#23) is DENIED
18 as moot.

19 The Court orders the case transferred to the District of Arizona.

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21 Dated: January 8, 2008.

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24 **ROGER L. HUNT**
25 Chief United States District Judge
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